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OFFICE OF PETITIONS

In re Patent No. 6,454,282	:	
Issue Date: September 24, 2002	:	
Application No. 09/755,800	:	DECISION ON PETITION
Filed: January 5, 2011	:	UNDER 37 CFR 1.378(b)
Attorney Docket No. 8127-3	:	
Patentee(s): Sexton et al.	:	

This is a decision on the petition under 37 CFR 1.378(b), filed February 3, 2011, to accept an unavoidably delayed payment of a maintenance fee for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). **Any such petition for reconsideration must be accompanied by the petition fee of \$400 as set forth in 37 CFR 1.17(f).** The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Director.

The patent issued September 24, 2002. The 7.5-year maintenance fee could have been paid from September 24, 2009 through March 24, 2010, or with a surcharge during the period from March 25, 2010 through September 24, 2010. Accordingly, the patent expired at midnight September 24, 2010, for failure to timely submit the 7.5-year maintenance fee.

A petition to accept the delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(i)(1).

This petition lacks item (1) above.

Petitioner states that the delay in payment of the 7.5-year maintenance fee was unavoidable due to the correspondence address not being timely and properly updated. On July 3, 2008, a Change of Correspondence Address was received. Although it was originally deemed unreadable and not processed, on March 9, 2011, the correspondence address was finally processed and the address was updated in the USPTO system.

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.378(b)(3).

37 CFR 1.378(b)(3) states that any petition to accept delayed payment of a maintenance fee must include:

“A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. . The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date, and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.”

As 35 USC § 41(b) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 USC § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees. Ray v. Lehman, 55 F.3d 606, 609, 34 USPQ2d 1786, 1788 (Fed. Cir. 1995) (quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm’r Pat. 1988), aff’d dub nom. That is, an adequate showing that the delay in payment of the maintenance fee at issue was “unavoidable” within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken by the responsible party to ensure the timely payment of the maintenance fee for this patent. Id. As the patent holder at the time of expiration, it was incumbent on petitioner to have itself docketed this patent for payment of the maintenance fee in a reliable system as would be employed by a prudent and careful person with respect to his most important business, or to have engaged another for that purpose. See California Medical Products v. Technol Med. Prod., 921 F.Supp. 1219, 1259 (D.Del. 1995). Even where another has been relied upon to pay the maintenance fees, such asserted reliance per se does not provide a petitioner with a showing of unavoidable delay within the meaning of 37 CFR § 1.378(b) and 35 USC § 41(c). Id. Rather, such reliance merely shifts the focus of the inquiry from the petitioner to whether the obligated party acted reasonably and prudently. Id. Nevertheless, a petitioner is bound by any errors that may have been committed by the obligated party. Id.

In view of the requirement to enumerate the steps taken to ensure timely payment of the maintenance fee, the patentee’s lack of knowledge of the need to pay the maintenance fee and the failure to receive the Maintenance Fee Reminder do not constitute unavoidable delay. See Patent No. 4,409,763, supra. See also Final Rule entitled “Final Rules for Patent Maintenance Fees,” published in Federal Register at 49 Fed. Reg. 34716, 34722-23 (August 31, 1984), and republished in the Official Gazette at Off. Gaz Pat. Office 28, 34 (September 25, 1984). Under the statutes and rules, the Office has no duty to notify patentees of the requirement to pay maintenance fees or to notify patentees when the maintenance fees are due. It is solely the responsibility of the patentee to assure that the maintenance fee is timely paid to prevent expiration of the patent. The lack of knowledge of the requirement to pay a maintenance fee and the failure to receive the Maintenance Fee Reminder will not shift the burden of monitoring the time for paying maintenance fee from patentee to the Office. See MPEP 2590.

However, the record fails to show that adequate steps within the meaning of 37 CFR 1.378(b)(3) were taken by or on behalf of petitioner to schedule or pay the maintenance fee. Petitioner is reminded that 37 CFR 1.378(b)(3) is a validly promulgated regulation, as is the requirement

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Any questions concerning this matter may be directed to Petitions Examiner Liana Walsh at (571) 272-3206.

/dab/
David Bucci
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